NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT MEMORANDUM*

On Remand from the United States Supreme Court

Before: HUG and WARDLAW, Circuit Judges, and SUKO,** District Judge.

The Warden appeals the district court's grant of Alexandre Mirzayance's petition for writ of habeas corpus based on ineffective assistance of counsel in his state trial court proceedings. In a memorandum disposition filed on April 10, 2006, we affirmed the decision of the district court.

I.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

This appeal now returns to us upon remand by the United States Supreme Court in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). We have requested and reviewed supplemental briefing by the parties discussing both the possible relevance of *Musladin*, as well as *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). We conclude that, especially in light of *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), our decision is unaffected by *Musladin* or *Landrigan*, and we therefore again affirm the grant of habeas corpus.

II.

We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."); *Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002)

(explaining AEDPA standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

III.

The district court and the magistrate judge misapprehended our prior remand for an evidentiary hearing on whether counsel's advice to withdraw the plea of not guilty by reason of insanity ("NGI") was a true tactical decision that constituted "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The citation to *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987), indicated only that labeling a decision "tactical" does not necessarily mean that a true tactical choice, one "between alternatives that each have the potential for both benefit and loss," was made. *Id.* at 1249. The evidentiary hearing was necessary, as the state had not conducted one, to resolve the conflicting evidence as to counsel's reason for abandoning Mirzayance's only defense—insanity.

IV.

Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. *Strickland*, 466 U.S. at 688. Counsel testified at the evidentiary hearing that he recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of Mirzayance's parents to testify in the insanity phase.

The Warden argues that counsel's decision was "strategic," and thus not deficient performance. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable" under *Strickland*. *Id.* at 690. We conclude, however, that counsel did not make a true tactical choice. Counsel failed to consider the likelihood that the jury, after hearing the substantial evidence available to show that Mirzayance was legally insane at the time of the killing, might be persuaded that Mirzayance was in fact insane. As lay people, they might not recognize, as counsel thought they would, the seeming

logical incompatibility between those two findings.[1] Moreover, counsel's fear that the jury would not find insanity after finding premeditation was unfounded, based on an unreasonable assumption that because the jury rejected the opinion of one mental health expert testifying on premeditation in the guilt phase, the jury would reject the testimony of four defense experts testifying during the NGI phase that Mirzayance was legally insane at the time of the murder. Further, although counsel claims that Mirzayance's parents refused to testify, the district court's finding that the parents did not refuse, but merely expressed reluctance to testify, is correct. Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not.

We disagree that counsel's decision was carefully weighed and not made rashly. Counsel himself admitted in the evidentiary hearing that he was "not sure"

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[1] As a matter of California law, insanity and premeditation are not mutually exclusive. To establish insanity under California law, the defendant must prove "that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." CAL. PENAL CODE § 25(b). Incapacity to know the nature and quality of one's act and to distinguish right from wrong is not incompatible with capacity to premeditate and deliberate, which does not necessarily require knowledge or understanding of the nature of the act premeditated or deliberated. Indeed, California law explicitly provides that premeditation and deliberation do not require a showing that "the defendant maturely and meaningfully reflected upon the gravity of his or her act." CAL. PENAL CODE § 189.

whether "given [his] anger at the parents, [he] became so emotional that [he] lost [his] sense of advocacy." Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless. Counsel had planned to present substantial evidence, including a "cadre of experts," to testify that Mirzayance was legally insane at the time of the killing. He did not know with any certainty that Mirzayance's parents would not testify and that he would lose the sympathy that could be gained from their testimony. That possibility remained open.

In addition, his decision was made not on the basis of the facts before him, but on speculation. The sole advantage counsel could identify of withdrawing the insanity plea was based on his speculation that the judge was sympathetic to Mirzayance and would sentence him to a psychiatric prison, but would sentence more harshly if the jury found him sane. This is not only speculative, but also contrary to law. Under California law, withdrawal of the insanity plea amounted to a concession that Mirzayance was indeed sane. *See* CAL. PENAL CODE § 1016 (noting that absent a plea of not guilty by reason of insanity, a defendant is presumed to be sane).

Thus, even accepting counsel's emotional and speculative reasoning, his decision ultimately secured only the loss of this sole potential advantage. No

actual tactical advantage was to be gained from counsel's advice; indeed, counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea. "Reasonably effective assistance" required here that counsel assert the only defense available, especially given the significant potential for success.

A "reasonable probability" exists that, but for counsel's recommendation that Mirzayance withdraw his insanity plea, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. If counsel had pursued the insanity phase of the trial, there is a reasonable probability—one "sufficient to undermine confidence in the outcome"—that the jury would have found Mirzayance insane. *Id.* As a result, Mirzayance would have been confined in a mental health facility rather than a prison, and confinement could be terminated when a sentencing court determined that his "sanity has been restored." CAL. PENAL CODE § 1026(a)-(b); *see also id.* § 190(a) (prescribing punishment for first-degree murder).

V.

Neither *Musladin* nor *Landrigan* alters this analysis. In *Musladin*, the Supreme Court upheld a state appellate court determination that Matthew Musladin received a fair trial despite the victim's family wearing buttons bearing the victim's picture in the audience during Musladin's trial. 127 S. Ct. at 653-54. Addressing Musladin's appeal on habeas, the Court found that the state court's determination was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. *Id.*; 28 U.S.C. § 2254(d)(1). In so holding, the Court distinguished its prior precedents of *Estelle v. Williams*, 425 U.S. 501 (1976) and *Holbrook v. Flynn*, 475 U.S. 560 (1986), both of which addressed state actors that allegedly violated defendants' fair-trial rights. The Court reasoned that *Estelle* and *Holbrook* did not govern Musladin's situation because those cases dealt with "state-sponsored courtroom practices," not "private-actor courtroom conduct," and no Supreme Court holding required the state to apply *Estelle* or *Holbrook* to the defendant's case. *Musladin*, 127 S. Ct. at 653-54. Because there was no Supreme Court precedent addressing private actors, the state court's determination could not be "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

In *Landrigan*, a defendant who had affirmatively instructed his counsel—in the presence of the sentencing judge—not to present mitigating evidence, later claimed ineffective assistance of counsel for failure to present mitigating evidence. 127 S. Ct. at 1937. The state supreme court determined that counsel's failure to present mitigating evidence to the trial court during the sentencing phase of this capital murder trial was not ineffective assistance, which the United States Supreme Court upheld as not contrary to or an unreasonable application of clearly established Supreme Court precedent. *Id.* at 1942. The Court reasoned that none of its precedents "addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. . . . Indeed, [the Supreme Court] ha[s] never addressed a situation like this." *Id.* The Court continued, "[A]t the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Id.*

In *Strickland*, the Court propounded the traditional two-pronged test applied to ineffective-assistance-of-counsel claims: (1) counsel's performance was deficient, falling below an "objective standard of reasonableness"; and (2) there is

a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. 466 U.S. at 687; *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). The Court has stated, unequivocally, that "[i]t is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Taylor*, 529 U.S. at 391. The Court has also stated that, because *Strickland* necessitates a "reasonableness" inquiry, the Court "ha[s] declined to articulate specific guidelines for appropriate attorney conduct." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

In light of the aforementioned principles, *Musladin* and *Landrigan* do not affect our prior disposition. First, unlike in *Musladin*, where the Supreme Court had not mandated that state courts apply the *Estelle* and *Holbrook* tests to the private conduct at issue, the Court has stated that *Strickland* is clearly established law, thus mandating that state courts apply the *Strickland* test to all ineffective-assistance-of-counsel claims.

Second, post-*Landrigan*, the Supreme Court has made clear that, because the ineffective-assistance-of-counsel analysis is one of reasonableness, the facts of each case will be unique, even in habeas cases:

> That [a] standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."

> *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*).

Panetti, 127 S. Ct. at 2858 (citations altered and omitted); *see also Rompilla v. Beard*, 545 U.S. 374, 377 (2005) ("This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment."); *Taylor*, 529 U.S. at 391 ("That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence,' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." (citation omitted)). Thus, the fact that no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense does not carry the day; instead, the state may not issue an opinion that is an unreasonable application of the general rules established in *Strickland*, which is clearly established law that is binding on the states.

VI.

We affirm the district court's grant of habeas relief, albeit on different grounds.[2] The petition for writ of habeas corpus is granted if, within one hundred and twenty (120) days from the date the mandate issues, the state court does not grant Mirzayance the opportunity to reinstate his NGI plea and to conduct a sanity phase of trial as to that defense.

AFFIRMED.

[2] "We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." *Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 484 (2005).